No. 5692

IN THE

United States Circuit Court of Appeals

For the Ninth District

SACRAMENTO SUBURBAN FRUIT LANDS COMPANY, a corporation,

Appellant,

vs.

EMIL JOHNSON,

Appellee.

BRIEF OF APPELLEE

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The facts in this case are almost identical with those involved in *Sacramento Suburban Fruit Lands Company* vs. *Elm,* 29 Fed. (2d) 233, and *Wellnitz* vs. *Sacramento Suburban Fruit Lands Company,* 274 Pac. 1016, and *Melin* vs. *Sacramento Suburban Fruit Lands Company,* No. 5671, the appeal of which is pending in this Court. All of these cases arose out of sales made by the appellant under a uniform scheme of representation and colonization of certain lands to the northward of the City of Sacramento, California.

I.

WHETHER OR NOT THE COURT ERRED IN OVERRULING THE DEMURRER TO THE COMPLAINT.

The demurrer was overruled *by consent*, no exception

was taken thereto, and the subject of limitations urged by appellant was not raised in the demurrer. The complaint alleges non-residence, which tolls the running of the statute.

Melin Brief, page 3.

II.

WHETHER OR NOT THE COURT ERRED IN SUSTAINING AN OBJECTION TO A QUESTION PROPOUNDED TO A WITNESS AS TO THE VALUE OF LAND IN THE DISTRICT WHERE THE LAND IN QUESTION WAS LOCATED.

(a) The mere quotation of the question, answers this point. It would certainly be incompetent, irrelevant and immaterial what the value of the land *in that district* was at any time. The point in issue, is the value of the particular land.

(b) The witness was poultryman. He had lived in the district six years. He testified that he *knew* the *present values* of land in the district, not the value in 1923. The court could do little else than sustain the objection.

(c) As to whether or not an expert witness has qualified himself to give an opinion, is largely a matter within the discretion of the trial court.

Kirstein vs. *Bekins,* 27 Cal. App. 586.
Hood vs. *Bekins Van & Storage Co.* 178 Cal 150 at 152; 172 Pac. 594.
Willard vs. *Valley Gas & Fuel Co.* 171 Cal 9; 151 Pac. 286.

The case relied upon, *Spring Valley Water Co.* vs. *Drinkhouse,* 92 Cal. 528, was a case where the owner

of property for twenty years was not allowed to give an opinion thereon. There is a distinction between the owner and other persons.

10 Cal. Jur. 1023.
McGowan vs. *Burg Bros.* 210 Pac. 545 at 547; 59 Cal. App. 219.

III.

WHETHER OR NOT THE COURT ERRED IN SUSTAINING AN OBJECTION TO A QUESTION CALLING FOR THE OPINION OF A WITNESS ASKED AS TO THE RAISING OF FRUIT UPON LAND WITH WHICH THE WITNESS WAS NOT FAMILIAR.

(a) The witness had not shown by his testimony that he knew anything about the Emil Johnson place. The only thing he said was that he knew its location. Whether or not he knew of any reason why fruit could not be grown would certainly not be relevant. There would not be a person in the world who could not say that he did not know of any reason why fruit could not be grown upon the Emil Johnson place if he were unfamiliar with the place. In fact, he would know nothing about it.

IV.

WHETHER OR NOT THE COURT ERRED IN EXCLUDING TESTIMONY OF THE WITNESS E. M. TRAXLER.

Appellant here was clearly attempting to prove specific instances of sales of lands in another district by its own witnesses upon direct examination. This clearly not

admissible.

10 Cal. Jur. 1027.
Estate of Ross, 171 Cal. 64, 151 Pac. 1138.

It will be observed that the only question which was not expressly withdrawn by appellant in the portion of the testimony quoted under this point, is the question as to what advantages were had in Arcade Park District which they had in Rio Linda.

V.

WHETHER OR NOT THE COURT ERRED IN STRIKING OUT THE TESTIMONY OF THE WITNESS CRINKLEY CONCERNING THE PURCHASE PRICE OF THE LAND.

It appears by the testimony of the witness Crinkley, (Transcript, pages 102-103) that the land was purchased in 1911. He became connected with appellant in 1915. His whole knowledge is based upon certain payments made by him in 1916. Of course, he could not give testimony about a transaction occurring four or five years before he had any knowledge of it.

VI.

WHETHER OR NOT THE COURT ERRED IN INSTRUCTING THE JURY UPON THE SUBJECT OF REPRESENTATIONS MADE IN THE PAMPHLET.

For its argument in this matter, appellant makes reference to the Loucks case No. 5657. Therein we have answered it. We have also answered the same arguments in practically all the other briefs.

VII.

WHETHER OR NOT THE COURT ERRED IN REFUSING TO GIVE DEFENDANT'S PROPOSED INSTRUCTION UPON THE QUESTION OF INTENT.

(a) There was no exception taken to the failure of the Court to give this instruction, except as follows:

> "and the neglect of the Court to instruct on the question of intent."

That is insufficient.

(b) The offered instruction is erroneous, as it does not cover the subject, nor explain when there need be no intent.

Spreckels vs. *Gorrill,* 152 Cal. 383.

(c) The court's "further" instruction upon the subject covered the matter. (Transcript, page 139.) No further exceptions were taken thereafter.

VIII.

WHETHER OR NOT THE COURT ERRED IN INSTRUCTING THE JURY RELATIVE TO THE SUBJECT OF INDUCEMENT.

(a) The only exception taken is as follows:

> "Except to the Court's instruction on the question of belief of plaintiff in the representations as an inducement and the representations having been made to induce him to buy." (Transcript, page 138.)

The exception is insufficient.

(b) The court's instruction upon the subject are eminently correct. The only part of the instruction quoted by appellant under this title which relates to

inducement is the first four lines thereof. The balance related to representations made positively by a person presuming to know whether or not they were true. Following is all of the reference made in the criticized instruction to the subject of inducement:

> "If you find that these representations of value and adaptation to commercial orchards were an inducement to plaintiff and influenced him to buy, then you proceed to the next step." (Transcript, page 122.)

The next step outlined was whether or not the defendant knew of the falsity of the representations or is bound to know under the circumstances and its manner of making the representations. The criticism of appellant is directed at the statement of the court that appellant should know facts to be true before it made positive representations about them.

IX.

WHETHER OR NOT THE COURT ERRED IN REFUSING THE INSTRUCTION OF APPELLANT ON THE SUBJECT OF THE STATUTE OF LIMITATIONS, AND IN THE INSTRUCTIONS GIVEN BY THE COURT UPON THAT SUBJECT.

(a) The only exception taken to the foregoing is as follows:

> "Except to the Court's instructions on the question of the statute of limitations, and the refusal of the Court to give instructions on the statute of limitations as proposed by defendant." (Transcript, page 139.)

As we pointed out in the Melin Brief, page 19 the exception is insufficient.

(b) As we pointed out in the Melin Brief, page 15 the defendant is a foreign corporation, non-resident of the State of California, and not entitled to the benefit of the California statute of limitations.

(c) The proposed instruction is erroneous. It states, in effect that appellee was not permitted to remain inactive after the transaction was completed, but it was his duty to "exercise reasonable diligence" to ascertain the truth of the facts alleged to have been represented to him.

This is not a true statement of the law. The party is not required to make an investigation as to the character of land misrepresented until there is some fact or circumstance brought to his attention which would tend to put him upon inquiry. The offered instruction should have that qualification.

McMahon vs. *Grimes,* 77 C. D.; 275 Pac. 440 at 445.

The court's instructions upon the subject of the statute of limitations are fair and ample (135, 136, 137 and 138, Transcript.)

We respectfully submit that the judgment should be affirmed.

Respectfully submitted,

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